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April 1, 1999

BY FAX: 212-964-1810

Mr. Beau Friedlander  
Context Media  
369 Broadway  
Suite 314  
New York, New York 10013

Re: TRUTH VERSUS LIES

Dear Beau:

At your request, I am writing to outline my preliminary thoughts on Ted Kaczynski's draft manuscript: Truth Versus Lies. As we discussed, I will be keeping my comments fairly general, for although this letter is written in the context of an attorney-client relationship, and under the attorney's work product doctrine, the letter may nevertheless lose its privilege due either to judicial error, or otherwise. It is also my concern that too detailed a discussion of potential legal issues can be manipulated by those who might wish to manufacture a claim. After all, a central theme of Ted Kaczynski's manuscript is precisely the vulnerability of our words and acts to distortion, innocent or otherwise, by third parties.

That said, the two principle rubrics under which my comments will fall are these: (a) Potential Claims For Copyright Infringement, and (b) Potential Claims For Defamation.

(a) Copyright Issues

Ted Kaczynski quotes extensively from third party sources, principally from letters written by Wanda Kaczynski and David Kaczynski; although other third party materials are also used. These others include the story by Horacio Quiroga, which, in Ted Kaczynski's translation, is used in its entirety; as well

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the investigative reports and quotations from statements made to the press.

In order to use these materials, the use must be either expressly permitted, or it must be such that a judge would deem it "fair use" under the copyright statute.

Express permission to reprint the Quiroga story must be obtained, and should not present any practical difficulty. Investigators reports were prepared, ultimately, for Ted Kaczynski, and it would be strange if they could not be used by him in this manner. The quotations from the news reports also present no problem that requires an analysis here.

If the Wanda and David writings are used with discretion, the fair use exception should be available. In that case, permission would not have to be obtained. (Nevertheless, I have some thoughts on how we might try to obtain permission, which I will set forth after a discussion of the fair use issue.)

Whether or not a judge will deem a non-permitted use of another's writings to be "fair use" is ultimately somewhat unpredictable. While a number of factors must be considered under the "fair use" provisions of the copyright law, there are no clear lines or rules. All will depend on the judge's application of the prescribed factors to the unique circumstances of the matter before him.

Most significantly, the purpose of the quotation must be "transformative" and also as limited as is reasonably possible. A use is "transformative" if secondary use serves a purpose different from the purpose of the original material. This "transformation" may be achieved, for example, when the quotation is used to prove a point about the author of the material quoted or to criticize the quoted writing itself. Even with a "transformative" use, however, the quoted portion of the underlying material must be as sparing as possible, only so much being used as is reasonably required to make the critical or analytic point.

In Truth Versus Lies, the use of the materials written by Wanda and David is fundamentally "transformative", but how sparing Ted Kaczynski has been in his quotation is not always possible for me to know. Each letter or other document quoted would constitute a separate "work," and Ted Kaczynski must tell us how much of that specific letter or other writing he is actually excerpting. From a strictly legal standpoint, obviously, the less quoted, the better.

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In paring down the quoted materials, which I suspect will be required in many cases, it would be helpful, in the editing process, to key each quotation -- least implicitly -- to one of the key arguments of the book. These would be, in this context, probably one of the following:

-- Wanda and David, in speaking to the public, made certain statements regarding Ted Kaczynski's upbringing, family relations and mental health, which representations Ted Kaczynski carefully contends were unfair or were unfactual, and Wanda and David's own writings are frequently the vehicle for Ted Kaczynski's arguments;

-- David, in particular, made public his own motivations in accusing his brother of being the unabomber, which representations were, it is contended, either false or inaccurate; and that David's writings show that his attitude towards his brother was, at best, ambivalent and thus different from what he wished the public to believe;

-- The writings are marshalled to show that David had a deep-seated resentment against Ted arising out of (i) Ted's sometimes insensitive treatment of David, and (ii) David's -- conscious or not -- sense of his own more modest abilities and attainments; and ...

-- David and Wanda made public statements regarding their motives in painting a picture of Ted as legally insane, which picture was belied by facts set forth in their own writings, which writings also cast doubt on the professed motives of Wanda and David for promoting the idea of Ted's "insanity."

In doing a "fair use" analysis of the various quoted materials of David and Wanda, it might well be considered, in each case, what is the purpose of the quotation, and has only that much of the underlying "work" been used which is reasonably necessary to prove the given point. It should also be asked, as a separate matter, what percentage of the total "work" is represented by the quoted material.

Naturally, all of the above would be academic if you were able to obtain permissions from Wanda and David. Possibly, this may be attainable, particularly if, as seems likely, David is contemplating a book of his own. If the copyright in David's letters belongs to David, so the copyright in Ted's letters belongs to Ted. It also means that David may already have

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violated Ted's copyright through the publication of Ted's letters without Ted's permission. Some of these violations may still be actionable, a fact of which David and Wanda may be reminded.

Reciprocal permissions may be attractive to David and Wanda, also, because (a) the publication of Ted's book will generate money for the unabomber's victims and their families, and David could be involved in the distribution of those monies, and (b) if David is contemplating a book, he will undoubtedly wish to draw liberally from his brother's letters, much as he has done before.

A careful -- but fundamentally above-board -- approach, I think, should be tried.

(b) Defamation Issues

The universe of possible defamation plaintiffs may be subdivided into the following classes:

1. Persons who have written for publication concerning Ted Kaczynski;
2. Wanda and David;
3. Other persons who spoke to the media concerning Ted Kaczynski;
4. Persons who spoke about Ted Kaczynski to investigators; and
5. Persons who made no statements concerning Ted Kaczynski.

Members of the press and those persons who spoke publicly about Ted Kaczynski would be, very likely, limited purpose public figures and assertions of fact can be made which will not be actionable unless such statements can be proved to be false and all the First Amendment press protections are answered.

Persons falling in classes 4 and 5 will have an easier time making a claim, but in some cases, they do not have to be identified at all in the manuscript.

Ted Kaczynski, in fact, recognizes this distinction where he states that he "usually" (page 11) omits the full name of persons who did not speak to the media. I think, however, that we ought to know where the exceptions have been made. We should also know whether the abbreviations used correspond to the

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actual names of the persons. Also, where a person is believed to have spoken to the media concerning Ted Kaczynski, we should know what that person said and where he said it, because there will be much greater leeway allowed for statements which constitute rebuttal and fair comment. >

I believe that there may be many places where individuals, currently indicated by initials, can with easy adjustments, be rendered unidentifiable without diminishing the force of the point that Ted Kaczynski is making in that context. An example would be at the bottom of page 156.

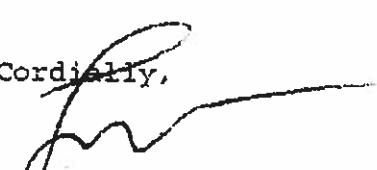
Another thing, generally, to be on the look out for are any instances where Ted Kaczynski himself expresses doubt as to the accuracy of his own statements or as to the reliability of his underlying sources. The accuracy of the quotations from other sources might be subject to some form of verification.

We must also consider that the manuscript, referring as it does to a rich trove of non-public materials, presents a strong temptation to opportunistic litigation undertaken for the real purpose of gaining access to those materials through the discovery process.

When the time comes, you and I will go over the manuscript in exquisite detail. A letter of this sort is not the place to do so, as I know you understand.

I look forward to working with you further on this very interesting book.

Cordially,



Jeffrey Craig Miller

JCM:bjg